

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MICHAEL MCEVILY, #339637,

Petitioner,

v.

ACTION NO. 2:06CV127

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to petitioner's convictions on November 9, 1999, in the Circuit Court of Fairfax County, Virginia, for petit larceny (felony), third or subsequent offense, as a result of which he was sentenced to serve two years imprisonment, with one year and three months suspended, and a two year period of probation.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Civil Rule 72 of the Local Rules for the United States District Court for the Eastern District of Virginia for report and recommendation. The Magistrate Judge filed his report recommending dismissal of the petition on July 11, 2006. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. The Court received from petitioner on August 1, 2006, objections to the report.

The Court, having reviewed the record and examined the objections filed by the petitioner and having made de novo findings with

respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report of the United States Magistrate Judge filed July 11, 2006. It is, therefore, ORDERED that the petition be DENIED and DISMISSED on the basis that the petition is successive and that judgment be entered in respondent's favor.

To the extent that petitioner objects to the Magistrate Judge's findings and conclusions, the objections are without merit. Petitioner's pleading is a successive petition, seeking to address the same issue raised in his previous petitions, to wit: the constitutionality of section 18.2-104 of the Virginia Code.

Contrary to petitioner's claims, the Magistrate Judge has not "completely omitted the underlying basis of the Petitioner's claim and has conspicuously adapted the position of the Respondent to formulate the representative opinion," and there is no fundamental jurisdictional defect as claimed by petitioner. (Doc. 10, Preface at 2.) Petitioner has filed four habeas petitions in this Court (2:03CV10; 2:05CV604; 2:06CV107; and the present petition), asserting that his conviction for petit larceny and sentence as a felon for petit larceny, third offense, is unconstitutional. Petitioner did not seek permission from the Fourth Circuit to file a subsequent habeas petition addressing the issue previously raised. The Magistrate Judge's conclusion that the petition is successive is correct.

Petitioner may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing

of the denial of a constitutional right.” Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

The Clerk shall mail a copy of this Final Order to petitioner and to counsel of record for the respondent.

/s/

Rebecca Beach Smith

Norfolk, Virginia

August 25, 2006